

Book reviews

Medicine, law and social change

Dartmouth, Dartmouth Publishing Group, 1993, 153 pages, hc £35.00

In this exceptional book, Leanna Darval has done something which relatively few writers in the medico-legal field have done. She has taken the broad political view, and tried to establish why and how changes in the law relating to medical practice have come about. In doing so, she has done a great service to both medical ethics and medical law – providing a vision of how major changes of social mood have resulted in specific changes in the attitude of the professions and the courts. This, therefore, is something of a taking-stock exercise, and a remarkably interesting and useful one at that.

We all know that the old-style paternalism is dead and that patients increasingly know what information they want and how they are to be treated. For some, these changes have not come quickly enough, and the law has been seen as largely obstructive – an institution infected with reactionary sentiment and social and gender prejudice. For others, the courts have been excessively intrusive, and have assisted in the destruction of the delicate relationship of trust which previously existed between doctor and patient but which now has been replaced by suspicion and distance. Where one stands in relation to this will depend, to a great extent, on one's social philosophy and one's sense of where this is leading, but the fact of change can certainly not be denied.

The author's major concern is to show how these changes have been achieved, taking as her examples a number of areas of medicine where these issues have been litigated or legislated upon. These are information and consent, refusal of treatment and research. In each of these, the

same forces can be seen at work – consumerist pressures, feminism, and certain other politically inspired movements, such as gay rights lobbies. Faced with this new spirit of assertion of the individual, it is not surprising that the paternalist ethic in medicine, and its associated claims of professional privilege, should have become distinctly compromised.

The account that this book provides of the way in which these forces have affected the medical regulation of medicine is revealing. Numerous examples are given of court decisions and legislative responses which demonstrate how these forces have chipped away at the professional monolith, with varying degrees of success. Of particular interest is the author's treatment of how priorities in the regulation of research have been affected by the political determination of affected groups (such as those affected by HIV) to set the pace at which drugs are approved. Other voices are demanding to be heard on the issue of research – and the author says they must be heard: these are the voices of women, children, drug-users, aboriginal people and ethnic minorities. The cosy, club-like atmosphere of the scientific establishment may not like this, but the pressure is probably irresistible.

Out of the ruins of the old paternalism has arisen a view of individual autonomy which has increasingly dominated the modern debate in medical law and ethics. The author discusses this in her first chapter, which is, from the theoretical point of view, the most challenging chapter in the book, although she remains dispassionate in her treatment of the sometimes contradictory threads of thought in this area. In a sense this is the very heart of the matter: the way in which medicine will be practised in any society will depend on the vision which that society has of itself. This may seem trite, but it really is seminal. If we take the atomistic view, in which

society is composed of individuals all highly conscious of their rights and eager to assert them (and this is the picture with which we are presented, and which Mrs Margaret Thatcher so revealingly endorsed in her denial of the existence of society), then medical priorities and limits are going to reflect the aspirations of those individuals. How, one might ask, is any moral value to be asserted in such circumstances? How is the issue of moral relativism to be addressed, if it is to be addressed at all? Could it be that a really insidious effect of consumerism and the highly individualistic, autonomy-based ethic which has accompanied it, has played straight into the hands of those who are quite happy to destroy the notion of public goods, including socialised medicine? If one continues to stress the importance of the individual always getting what he or she wants, and making his own decisions to which no external moral yardstick will be applied, then there are those who will be very happy to say: 'Yes, and let the individual look after himself while he is about it'. And in one fell swoop, the notions of community, and mutually shared moral values, are outflanked – *which is exactly what has been happening*. So perhaps the champions of autonomy, the exponents of self-determination, might pause to reflect on where strident assertion of individual and sectional interests can lead. Co-operative effort requires a shared sense of values. If you destroy the shared sense of values, you weaken the grounds upon which community values can be asserted, and you weaken the public goods which that community can create for itself.

This is one of the most valuable and thought-provoking books on medical law to be published for a considerable time. It will serve as a source of reference and hard fact in the future for those who wish to see how the law is reflecting ideological changes and converting moral positions into

practical rules. Although much of this process has been positive, there are some aspects of it which are not. Each time one encounters a doctor who complains of being treated badly by excessively demanding patients, who has been the subject of groundless and ill-tempered complaints, who has been cast into depression by the prospect of litigation, one is inclined to reflect on the dark side of consumerism and the 'cult' of individual rights. Consumerism, as recent British experience has shown, leads to the shallow world of 'charters', and one wonders whether this is what we need. Perhaps we need more emphasis on obligations, private and public, to balance the talk of rights; we need to re-assert community, however that might be done. The processes which this book reveals all reflect the assertion of individual or sectional interest, and there must be much more debate on this. This well written and intriguing book will serve as an excellent starting point.

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Medical confidentiality and legal privilege

Jean McHale, London, Routledge, 1993, 160 pages, £35.00

It is one of the nastier dilemmas facing a doctor: he is in the witness box and is asked a question about a patient. If he answers, he breaches the patient's confidence; if he declines to answer, he may be withholding evidence which could deny an accused person the chance of a proper defence. In the background, too, is the consideration that if he fails to answer, he may be imprisoned for his pains. Fortunately, this is not an everyday situation, but it is none the less a problem which does occur on occasion and which raises serious issues for the courts.

English law currently recognises an evidential privilege only in very limited circumstances, and does not extend it to doctors or to those engaged in other professions allied to medicine – Scots law takes much the same view. A lawyer is not compelled to disclose matters which have passed between himself and his client in relation to litigation, and may stay silent

with impunity, but a doctor, priest, nurse, psychotherapist or accountant has no such right. It will avail such persons naught that their code of ethics enjoins strict confidence; a failure to answer a relevant question in court will be a punishable offence.

The law has not been completely insensitive to the problem of confidentiality in the past. There have been some suggestions that there is a judicial discretion to exclude evidence relating to confidential matters, and the author cites several remarks by Lord Denning to this effect. Lord Denning, however, was a very special judge – with a marked sympathy for doctors – and if medical privilege is to be introduced it will have to be done by legislation rather than by judicial decision.

There are legal models to follow. Quebec, for example, specifically allows privilege to be claimed by priests, advocates, doctors and dentists, while in some Australian states privilege is allowed at least in relation to civil litigation. In the United States there is considerable privilege accorded to doctors in the witness box, and this is particularly so in the case of psychiatrists.

There are certainly sound pragmatic reasons for allowing medical privilege in court proceedings – the greater the public confidence in medical secrecy the more likely will the public be to trust and confide in doctors (particularly in sexual matters, such as those with a bearing on HIV infection). Yet the real issue here is whether the value of preserving medical confidentiality outweighs the interest which a civil litigant or a defendant in a criminal trial has in having all relevant matters revealed to the court. The author's thesis is that subject to several specific exceptions – such as those cases where the welfare of a child is at stake, or where a defendant stands to be convicted of a serious crime – the interest in preserving confidence deserves the greater protection.

If an evidential privilege statute were to be introduced, the effect would be to give the patient a veto on the disclosure in court of medical information which he or she wishes to keep confidential. In her final chapter, the author considers the practical impact of such a statute, and it is here that her case will probably be given its closest examination by lawyers. The author acknowledges potential objections, but points out that in practice courts and tribunals will be able to draw

appropriate conclusions even if they are denied access to medical information about a party to proceedings. It will not therefore be fatal to the case of an employer in unfair dismissal proceedings that there is no access to medical records; an employee's patterns of behaviour in the past may provide adequate evidence as to the likely pattern of events in the future. Possibly. In criminal proceedings, the privilege would be overruled, anyway, if the offence were of a sufficiently serious nature, and so there could be no question of privilege causing a miscarriage of justice.

If the impact of an evidential privilege statute were to be so cushioned, then the case for its introduction appears reasonably strong, particularly in view of the dilutions of the principle of confidentiality which seem to be occurring in other contexts. This interesting and well written book sets out the whole issue very clearly and should be a useful addition to the library of those who are interested in confidentiality and the dilemmas it creates.

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A companion to ethics

Edited by Peter Singer, Oxford, Blackwell, 1993, 565 pages, pb £15.99

Do not expect a companion that slips comfortably into the pocket, a ready source of profit and pleasure while queuing at Sainsbury's. This is a large book, with nearly fifty articles informing us about the history of ethics (eastern and western), moral theory, applied ethics and meta-ethics and challenges from such critical standpoints as feminism and marxism. Despite its size, the excellent organisation and layout of the material has resulted in a thoroughly approachable book that is, in general terms, remarkably good value. However, suppose that we ask a more specific question. How useful would this book be to those with little background in philosophical ethics (presumably its principal target) who wish to make a study of problems in medical ethics? We can then focus on the two most pertinent kinds of contribution, those on the relevant parts of applied ethics and those on moral theory.